Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket 07-42
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105

REPLY COMMENTS OF NCTA—THE INTERNET & TELEVISION ASSOCIATION

NCTA—The Internet & Television Association submits these Reply Comments in the above-captioned proceeding.

As a general matter, the comments filed by the handful of leased access proponents ignore the seismic shifts that have occurred since the Commission last looked at leased access over a decade ago. As we showed in our initial comments, none of the reasons why Congress mandated a set-aside of channels for leasing by programmers unable otherwise to secure a spot on a cable system's channel lineup still exist 34 years later. When any video programmer can freely reach an essentially unlimited number of potential viewers without needing to lease time on a cable system, leased access has plainly outlived its raison d'être. In this environment, it makes no sense – and would only compound the serious First Amendment problems posed by leased access – to impose even *more* requirements on cable operators, when just the opposite is warranted.

Congress could not justify enacting leased access anew in today's marketplace. That reality, coupled with the FCC's duty to reexamine its policies and adapt them to changed circumstances, compels reform of its leased access rules. The rules must be modified and modernized to ensure that in the face of dramatic changes in the video marketplace, "the price,

terms, and conditions of such use . . . are at least sufficient to *assure* that such use will not *adversely affect* the operation, financial condition, or market development of the cable system."[1] As the D.C. Circuit explained, "This provision serves as more than a mere 'caveat' to the ultimate goals of promoting leased access. The rates, terms and conditions of leased access must be set within its limits."[2] This means that the Commission must minimize the burdens and costs of leased access uniquely shouldered by cable operators (and ultimately borne by their customers) in today's highly competitive marketplace. This statutory mandate is even more compelling today since programmers have so many alternative ways to reach viewers thanks to the Internet.

While the Notice of Proposed Rulemaking proposes rule changes to adapt to today's marketplace (and NCTA and ACA[3] supported these changes and proposed a few more), certain commenters proffer a wish list of *new* regulations that would move in precisely the opposite direction. Their proposals would leave cable operators even more exposed to unrecouped costs and liabilities, contrary to the statute. Many of these proposals that would further skew the rules in favor of leased access users are not new, and their fundamental flaws remain.

For example, some commenters seek to resurrect burdensome elements of the now-defunct 2008 leased access rules.[4] But these rules never went into effect precisely because they failed to pass OMB scrutiny under the Paperwork Reduction Act[5] and also were stayed by the

---

1 47 U.S.C. § 532(c)(1) (emphasis added).

2 *ValueVision Int'l v. FCC*, 149 F.3d 1204, 1209 (D.C. Cir. 1998).

3 Comments of the American Cable Association (filed July 30, 2018).

4 *See, e.g.*, Comments of Small Business Network, MB Docket Nos. 07-42, 17-105 (filed July 30, 2018) (seeking to impose customer service standards and other elements of the 2008 rules).

5 Notice of Office of Management and Budget Action, OMB Control No. 360-0568 (July 9, 2008).

U.S. Court of Appeals for the Sixth Circuit, which found NCTA and others likely to succeed on their claims that the rules were arbitrary and unlawful.[6] Commenters offer no reason to believe that the problems with these rules could be cured or that they would fare any better today under OMB or judicial scrutiny. This is particularly true since, over the ensuing ten years, the Internet has become an even more powerful and effective avenue for the distribution of programming.

Yet other commenters continue to urge the Commission to adopt provisions rejected as part of its 2008 rulemaking, by requiring cable operators to restructure their system operations to suit their individual desires by, for example, proposing that cable operators subdivide their program delivery into smaller zones that may be preferred by a prospective lessee.[7] But compelling operators to reconfigure their system operations to satisfy leased access users is directly at odds with the statutory protection against leased access adversely affecting system operations.[8] Others seek to relitigate issues – such as the right of cable operators to require leased access users to obtain reasonable insurance coverage[9] – that were long-ago resolved by the Commission.[10]

---

6 Order, *United Church of Christ Office of Commc'ns, Inc. v. FCC*, No. 08-3245 (and consolidated cases) (6th Cir. May 22, 2008).

7 Comments of Leased Access Programmers Association at 11 ("LAPA Comments"); Comments of Combonate Media Group at 2-3. The Commission rejected this same proposal in its 2008 Leased Access Order, acknowledging that "with the consolidation of headends, programmers may be forced to purchase larger areas at higher costs than they would prefer." *In re Leased Commercial Access*, Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909, 2916 (2008). While the Commission said it "may revisit this issue if circumstances warrant,"*id.*at 2917, nothing in the comments suggest that any such circumstances exist or that it would be legally permissible for the Commission to mandate that operators lease capacity to serve viewers in only a portion of its system that a lessee hopes to reach.

8 47 U.S.C. § 532(c)(i).

9 *See, e.g.*, Comments of Charles H. "Charlie" Stogner, President, LAPA and CEO, StogMedia at 10-11 ("StogMedia Comments"); LAPA Comments at 14; Comments of Baskin L. Jones at 3.

10 *See, e.g., In re Church of New Bedford v. MediaOne*, Order on Reconsideration, 14 FCC Rcd 2863 (1999) (explaining that a cable operator has a right to require reasonable liability insurance coverage for leased access programming and detailing history of this protection).

A few commenters also propose a new and burdensome requirement that would force cable operators to provide leased access programming in high definition ("HD"), rather than standard definition, format.[11] But nothing in Section 612 of the Cable Act or Commission precedent suggests that lessees have a right to bandwidth-intensive HD on a local cable system. A cable system's finite channel capacity means that not all programming services that desire HD carriage can be accommodated, and many services carried by cable operators on a negotiated basis are carried only in standard definition. Leased access users should have no greater rights to demand HD carriage than other programmers.[12]

Finally, American Independent Media ("AIM") tries to inject issues unrelated to leased access into this proceeding. For example, it claims that leased access needs to be strengthened "so that independent media voices can serve cable subscribers throughout the U.S."[13] This amounts to nothing more than the claim, previously rejected by the Commission and D.C. Circuit, that the rules should maximize usage of leased access capacity by any independent programmer that wants to be carried, without regard to their impact on the cable operator's "operation, financial condition, or market development," and without regard to the status of competition and diversity in the video programming marketplace.[14] The ability of independent programmers to reach viewers generally has already been extensively commented on in a

---

11 *See, e.g.*, Comments of Jon C. Moon, Owner, Ridgeline TV Channel 99 at 3.

12 In contrast to leased access programmers, Congress adopted specific provisions regarding the manner of carriage of television broadcast signals. 47 U.S.C. § 534(b)(4)(A) (requiring local commercial television stations to be carried "without material degradation" and requiring the Commission to "adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by the cable system for the carriage of local commercial television stations will be no less than that provided by the systems for carriage of any other type of signal"). Having addressed this issue in the mandatory carriage section of the Cable Act and excluding it from the leased access section provides further evidence that Congress left the manner of carriage of leased access programming to a cable operator's discretion.

13 Comments of American Independent Media at 4 ("AIM Comments").

14 *See supra* n.2.

separate proceeding,[15] and the record in that proceeding shows that the vast majority of the thoroughly diverse programming carried by cable systems is unaffiliated with cable operators. There is no need for an artificial regulatory boost to programmers seeking carriage under Section 612, and, in any event, the leased access provisions of the statute do not contemplate such a boost.

The fact of the matter is that the independent programmers that AIM supposedly is speaking for do not want to pay for leased access, they want to get paid for carriage, as AIM's filing makes clear. AIM's comments complain about media content consolidation leading to "lower fees" for independent programmers,[16] even though leased access programmers *pay* fees to the cable operator, not the other way around. To the extent that AIM seeks to reduce leased access rates even further "in favor of a rate that allows a sufficient number of independent programmers to gain carriage on major cable operators,"[17] it misapprehends the Commission's statutory authority. The Commission has made clear that leased access rates should not subsidize lessees.[18] In short, AIM provides no reason to further burden cable operators with anachronistic leased access obligations.

CONCLUSION

In sum, the record contains no reason to impose the even more onerous obligations championed by some commenters. Instead, for the reasons stated herein and in NCTA's initial comments in this proceeding, the Commission should take steps to minimize the burdens that the

---

15 *Promoting the Availability of Diverse and Independent Sources of Video*, MB Docket No. 16-41 (2016).

16 AIM Comments at 9.

17 *Id.* at 12.

18 *ValueVision Int'l*, 149 F. 3d at 1209.

existing rules impose on cable operators and should recommend to Congress that the leased access provisions be repealed.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen
Michael S. Schooler
Diane B. Burstein
NCTA – The Internet & Television Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431

August 13, 2018